

Becoming a United States Administrative Law Judge

Hon. Erin Masson Wirth

Should you consider becoming a United States Administrative Law Judge?

OVERVIEW

The United States Administrative Law Judge (ALJ) position, originally called a hearing examiner, was created by the Administrative Procedure Act in 1946 to ensure fairness in administrative proceedings before federal government agencies.

Administrative Law Judges serve as independent and impartial triers of fact in proceedings requiring a decision on the record after the opportunity for a hearing. The Supreme Court explained:

[F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits

together with the pleadings constitutes the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.

Butz v. Economou, 438 U. S. 478, 513 (1978) (citations omitted).

Administrative Law Judges adjudicate cases for a wide variety of federal agencies. Currently, there are over 1,700 Administrative Law Judges assigned to 30 federal agencies. Cases may involve federal laws and regulations in such areas as admiralty, advertising, antitrust, banking, communications, energy, environmental protection, food and drugs, health and safety, housing, international trade, labor management relations, securities and commodities markets, and social security disability and other benefits claims.

Administrative Law Judges are sometimes called “Article I Judges” because their legitimacy arises under the executive branch powers set out in Article I of the U.S. Constitution, rather than the judicial branch powers set out in Article III.

ADMINISTRATIVE PROCEEDINGS

The Supreme Court has stated that certain “administrative proceedings bear a remarkably strong resemblance to civil litigation in federal courts.” *Federal Maritime Commission v. S.C. State Ports Authority*, 535 U.S. 743, 757 (2002).

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is “functionally comparable” to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.

Butz v. Economou, 438 U.S. 478, 513 (1978) (citations omitted).

Administrative Law Judges conduct formal hearings involving cases where all interested parties are given advance notice of the hearing; an opportunity to submit facts, arguments, offers of settlement or proposals of adjustment; and an opportunity to be accompanied, represented, and advised by counsel or other qualified representatives. Administrative Law Judges administer oaths and affirmations, issue subpoenas, rule on preliminary motions, conduct pre-hearing and settlement conferences, conduct hearings with cross-examination, review briefs, and prepare and issue initial decisions, along with written findings of fact and conclusions of law.

Administrative Law Judges are guaranteed decisional independence to ensure due process. By statute, Administrative Law Judges may be discharged only for good cause and they must be free from supervision or direction by executive branch agents engaged in investigative or prosecutorial functions. Ex parte communications, performance ratings, and bonuses are forbidden.

The Office of Personnel Management (OPM) has oversight responsibility for Administrative Law Judge appointment and pay. OPM employs a rigorous process to screen, qualify, and select experienced attorney applicants for placement on a register of those eligible for appointment by agencies having a need for Administrative Law Judges. The selection and appointment of Administrative Law Judges is entirely merit based.

Administrative Law Judges are not Administrative Judges. Administrative Judges adjudicate cases that do not require an Administrative Law Judge and may review Administrative Law Judge decisions. The similarity of both names and responsibilities leads to confusion between them. The primary difference is that Administrative Judges serve at the will of and under supervision of the agencies while Administrative Law Judges have decisional independence guaranteed by the Administrative Procedure Act.

TYPES OF CASES HEARD BY ADMINISTRATIVE LAW JUDGES

The agency employing the largest number of Administrative Law Judges is the Social Security Administration, with over 1,400. Other agencies with large numbers of Administrative Law Judges include the Department of Health and Human Services/Office of Medicare Hearings and Appeals, with 90; Department of Labor, with 40; and, the National Labor Relations Board, with 35. The remaining Administrative Law Judges are employed in agencies with fewer than 20 Judges.

Administrative Law Judges try cases falling into three broad categories: entitlement, regulatory, and enforcement cases. Entitlement cases involve adjudication of claims for benefits, for example, disability benefits under the Social Security Act, and workers' compensation benefits under the Longshoremen and Harbor Workers Compensation Act. Regulatory cases, such as those of the Federal Energy Regulatory Commission, involve economic regulation of rates and services provided by the energy industry. Enforcement cases involve adjudication of cases brought by various federal agencies against individuals or companies to enforce federal laws and regulations, such as: mine safety cases heard by the Federal Mine Safety and Health Review Commission; animal welfare cases heard by the Department of Agriculture; and, housing discrimination cases, heard by the Department of Housing and Urban Development.

The day to day experience of Administrative Law Judges assigned to these different agencies are as varied as imaginable. Each agency has its own culture, rules and regulations, judicial structures, histories, and limitations. A typical Social Security disability hearing may last an hour or two, while hearings at other agencies may last days or weeks. Rules at some agencies permit discovery and Judges handle many pre-hearing motions, while at other agencies, discovery is limited or not permitted. The type of evidence reviewed ranges from medical reports to economic expert testimony.

The Social Security Administration has hearing offices spread throughout the country, including one or more in every

state. Social Security disability hearings are non-adversarial with testimony from the claimant and expert witnesses but without a representative for the government. Typically, Social Security Administrative Law Judges focus on hearing cases and making decisions, while attorney-advisors draft the decisions based on the Judge's instructions. Many Social Security Administrative Law Judges hear and decide 50 or more cases per month, as they are encouraged to do because of the high volume of applicants seeking disability benefits. Although the Social Security Administration has been at the forefront of utilizing video hearings, travel may be required to hear cases for claimants who decline or are not able to utilize video hearings.

Administrative Law Judges issue initial decisions which become final unless appealed. The appeals may be to Commissioners or employees appointed by the agency and often the appeal is de novo. Generally, the federal appellate courts may review a final agency decision. Social Security disability decisions are appealable to an appeals council, which consists of Administrative Judges selected and appointed by the agency. Those decisions are appealable to federal district court. A few Administrative Law Judges issue final decisions that are not subject to review.

Although all Administrative Law Judges are employed by specific agencies, with the permission of OPM, they may hear cases for other agencies by interagency agreement as caseloads require.

If you are interested in learning more about the particular types of cases heard at different agencies, there is a lot of information available on the internet. Many agencies have an Office of Administrative Law Judges with a website which publishes recent decisions. In addition, agency rules and journal or law review articles can provide insights into a particular area of law. As with any employment prospect, it pays to do your homework.

QUALIFICATIONS

The Office of Personnel Management reopens the Administrative Law Judge examination to the public on a periodic basis, as the need arises. When OPM reopens the examination, a notice will be posted on OPM's USAJOBS website, and it is suggested that you register for daily notification of relevant openings. OPM may go a year or longer between openings and may only leave the position open for a short period of time. It is helpful to have given some thought to your application ahead of time.

According to OPM, after the ALJ examination is opened, applicants who successfully complete all elements of the examination and receive a final numerical rating have their names and ratings placed on the ALJ register. The ALJ register is used as the source of names to make referrals to agencies for employment consideration when there are vacancies to fill. Names are referred in numerical score order, based on the duty location, number of positions to be filled, and the geographical preferences of applicants. Agencies make selections from the list of candidates referred for employment consideration from among the highest three available names.

OPM also administers the ALJ examination on a quarterly basis to 10-point preference eligible veterans who meet the regulatory requirement and apply for the closed ALJ examination.

When first applying to become an Administrative Law Judge, candidates must indicate their geographic preference. Not surprisingly, Washington, DC, and other popular cities have limited openings. Candidates who are flexible can indicate that they are willing to work anywhere, but they should be prepared to move to a new location with only a few weeks or months notice. Although transfers between locations occur, they may take a number of years.

The minimum requirements for an Administrative Law Judge position have not changed for many decades. The applicant must demonstrate: an active law license in good standing; seven years of qualifying experience; and, sufficient

score on an examination.

It is advisable to maintain an active law license where possible, although judicial status is acceptable in lieu of “active” status in states that prohibit sitting Judges from maintaining “active” status to practice law. Being in “good standing” is acceptable in lieu of “active” status in states where the licensing authority considers “good standing” as having a current license to practice law.

The definition of qualifying experience shifts but has consistently included litigation. Litigation experience may include alternative dispute resolution and appellate work. In addition, administrative litigation under a formal procedure may qualify. Uncontested cases with no formal hearing procedures do not count as qualifying experience to meet the seven year requirement. Previously, demonstration of the seven years of experience required summaries of ten significant cases including references from adversaries, judges, or others affiliated with the cases. Some suggest we should return to that system.

EXAMINATION

OPM’s application process has evolved over time. Applicants are encouraged to read OPM’s application materials to confirm current requirements and to follow those requirements very carefully. The process is unique and lengthy – it can take a number of years to be hired.

OPM utilizes an occupational analysis to identify key competencies necessary to serve as an Administrative Law Judge. This occupational analysis is updated from time to time to ensure that the examination tests for knowledge, skills, and abilities appropriate for the position.

The current examination looks for the following competencies: (1) decision making; (2) interpersonal skills; (3) judicial analysis; (4) judicial decisiveness; (5) judicial management; (6) judicial temperament; (7) litigation and courtroom competence; (8) oral communication; (9) problem solving; (10) professionalism; (11) reasoning; (12) self-management; and, (13) writing.

Recently, an on-line component was added to the examination process. This stage of the examination includes a timed situational judgement test, a timed writing sample, and an untimed experience assessment. Applicants are emailed information about this component and provided a window in which to complete the on-line portion. If scores are sufficient, the applicant is invited to the proctored portions of the examination.

A four hour written examination and structured interview have been part of the examination for many years. Recently, a short logic based measurement test was added. These in-person components are frequently conducted in Washington, DC, over two days, although in the past, it was offered in other cities. Applicants are not compensated for their time or travel to participate in the examination.

The examination is graded on a strict and confidential formula, and the applicant is given a final score. OPM works to make all testing and grading as objective and fair as possible. Nevertheless, an appeal process is provided, again with strict processing requirements.

Meeting an established minimum score permits the applicant to be placed on the register from which individual agencies may hire. Generally speaking, an agency must hire one of the top three highest scoring applicants interested in that geographical location.

The vast majority of Administrative Law Judges are hired by Social Security. Agencies with a vacancy may, with permission of OPM, hire Administrative Law Judges from other agencies. Many Judges stay with the Social Security Administration, in part because offices are located throughout the country. Competition to transfer to smaller agencies can be stiff as there are not many openings. Significant litigation experience provides the most useful background and enhances an application.

PAY AND BENEFITS

Administrative Law Judges are paid on the AL scale and OPM maintains a list of the basic and locality rates of pay. Pay is capped at Level III of the executive schedule. Although Administrative Law Judges are entitled to receive locality payments under 5 U.S.C. § 5304, since 1993, the pay cap has operated to compress and gradually eliminate locality pay, except for Administrative Law Judges with the least number of years of experience. It is recommended that the pay cap be removing or adjusted to relieve this compression.

In addition, Administrative Law Judges accrue leave under the same formula as new federal employees, which is significantly less than the leave granted to new Senior Executive Service and other senior government officials. These leave provisions may serve as a disincentive for experienced private practice attorneys without prior federal government experience to join the Administrative Law Judges ranks.

PROFESSIONAL ORGANIZATIONS

Federal Administrative Law Judges Conference (FALJC)

Founded on February 6, 1947, the Federal Administrative Law Judges Conference (FALJC) is a voluntary professional association, organized for the purpose of improving the administrative judicial process, presenting educational programs to enhance the judicial skills of Administrative Law Judges, and representing the concerns of all United States Administrative Law Judges in matters affecting the federal administrative judiciary.

FALJC is the only organization that speaks for the entire spectrum of federal Administrative Law Judges. Over the years, the Conference has taken leadership roles in preserving the decisional independence of Administrative Law Judges, supporting measures enhancing due process of law in administrative judicial proceedings, and in supporting improvements in the fairness of the administrative judicial process by supporting legislation that serves two goals: enhancing the transparency of the administrative judicial process and the public's perception of its fairness. FALJC has

steadfastly maintained that there can be no due process of law for the litigants—both private citizens and the United States Government—without an independent administrative judiciary.

FALJC has been in the forefront on core issues of importance to the federal administrative judiciary, including maintaining the integrity of the merit selection process and preserving judicial independence. FALJC has also highlighted the need to address leave disparities and pay compression, eligibility qualifications, and the need for an independent federal administrative judiciary to employ and supervise Administrative Law Judges. FALJC tracks the latest developments for federal Administrative Law Judges, including legislative activity, and makes this information available on its website and at its annual conference.

Association of Administrative Law Judges (AALJ)

The Association of Administrative Law Judges (AALJ) is the union representing Social Security Administrative Law Judges. AALJ was founded as a professional association in 1971. In 1999, AALJ affiliated with the International Federation of Professional and Technical Engineers, AFL-CIO. According to their website, more than 80 percent of Social Security Administration Judges are active members of AALJ. AALJ's goals are to defend judicial independence and due process during administrative hearings, and advance professionalism of Administrative Law Judges.

WHY I ENJOY BEING AN ADMINISTRATIVE LAW JUDGE

As a military spouse who moves frequently, I've had the opportunity to practice law around the country and work in a wide variety of settings. Frequently, I find myself drawn to public service. I enjoy being able to focus on legal issues as opposed to client development. Administrative Law Judges are able to rule on cases without being limited by client's wishes or political considerations. And, although the subject matter has differed greatly in the five agencies where I have worked, the commitment to fair and impartial hearings has remained consistent.

Throughout my career I have written and spoken about administrative law. There seems to be a steady stream of interesting and important issues that arise in the administrative context. In addition, many of these issues have practical implications on the day-to-day lives of fellow Americans. It has certainly been a fascinating and rewarding field of study.

As a past President of the Federal Administrative Law Judges Conference, I observed that Administrative Law Judges must work independently and be decisive. Attorneys who enjoy socializing or struggle to make decisions may want to consider whether this is the right position for them. Although Administrative Law Judges work with staff and run ideas past other Administrative Law Judges, they are limited in who they can talk to by ex parte rules, and are ultimately solely responsible for their decisions.

Fair and impartial Administrative Law Judges are central to our system of justice. We are responsible for deciding matters involving millions of dollars of taxpayer funding, affecting thousands of American corporations and their employees, and impacting our nation's economy in ways small and large. If you are committed to public service, demonstrate strong litigation skills, and have the patience to complete the complex examination process, then you should consider becoming a United States Administrative Law Judge.